SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 256, 282, 301

CADDO PARISH SCHOOL BOARD, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*

BOSSIER PARISH SCHOOL BOARD, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*

BOARD OF EDUCATION OF THE CITY OF BESSEMER, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*

BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*

EAST BATON ROUGE PARISH SCHOOL BOARD, *et al.*,
Petitioners,
v.
CLIFFORD EUGENE DAVIS, *et al.*

BRIEF IN OPPOSITION TO CERTIORARI

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Citations to Opinions Below

The opinion of a panel of the Court of Appeals, December 29, 1966, is reported *sub nom. United States* v. *Jefferson County Board of Education,* 372 F.2d 836 (5th Cir. 1966). A *per curiam* in the Baton Rouge case appears *sub nom. Davis* v. *East Baton Rouge Parish School Board,* 372 F.2d 949 (5th Cir. 1967). The opinion of the Court of Appeals on rehearing *en banc,* filed March 29, 1967, is not yet reported; it is appended to the petition filed in No. 256, as Exhibit L.

Opinions and orders of the District Courts, and opinions in prior proceedings in these cases are reported as follows:

Bessemer Case. The District Court order reviewed below, entered August 27, 1965 (R. Be. 85-86),[1] is unofficially reported *sub nom. Brown* v. *City of Bessemer Board of Education,* 10 Race Rel. L. Rep. 1015. A prior order entered July 30, 1965 (R. Be. 64-66) appears in 10 Race Rel. L. Rep. 1013. That order was vacated *sub nom. United States* v. *City of Bessemer Board of Education,* 349 F.2d 1021 (5th Cir. 1965) (*per curiam*).

Jefferson County Case. The District Court order entered August 27, 1965 (R. J. 70), is unofficially reported *sub nom. Stout* v. *Jefferson County Board of Education,* 10 Race Rel. L. Rep. 1030. A prior opinion and order of the District Court entered June 23, 1965 (R. J. 23, 27), are reported at 10 Race Rel. L. Rep. 1025. An order entered July 23, 1965 (R. J. 52), is unreported; it was vacated *sub*

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[1] Record citations are to pages in the records as printed for use in the Court of Appeals in these six separate cases. The following abbreviations are used to designate the respective records: Bessemer (Be.); Bossier (Bo.); Baton Rouge BR); Fairfield (F); Jefferson County (J); Caddo Parish (C).

nom. United States v. *Jefferson County Board of Education,* 349 F.2d 1021 (5th Cir. 1965) (*per curiam*).

Fairfield Case. The District Court order of August 23, 1965, and opinion dated September 7, 1965 (R. F. 65, 67), are unofficially reported *sub nom. Boykins* v. *Fairfield Board of Education,* 10 Race Rel. L. Rep. 1009.

Caddo Parish Case. The District Court orders of August 3, 1965, approving a proposed plan of desegregation (R. C. 291-298), and an order amending the plan on August 20, 1965 (R. C. 300-304) are unreported. A prior decree of the District Court is reported *sub nom. Jones* v. *Caddo Parish School Board,* 10 Race Rel. L. Rep. 1569 (June 14, 1965).

Bossier Parish Case. The order reviewed below, entered August 20, 1965 (R. Bo. II-261), is reported unofficially *sub nom. Jones* v. *Caddo Parish School Board,* 10 Race Rel. L. Rep. 1075. A prior order entered July 28, 1965 (R. Bo. II. 251), and unofficially reported in 10 Race Rel. L. Rep. 1074, was vacated by the Court of Appeals *sub nom. United States* v. *Bossier Parish School Board,* 349 F.2d 1020 (5th Cir. 1965) (*per curiam*). Other proceedings in this case are reported as *Lemon* v. *Bossier Parish School Board,* 240 F. Supp. 709, rehearing denied 240 F. Supp. 743 (W.D. La. 1965), affirmed 370 F.2d 847 (5th Cir. 1967), cert. denied 18 L.ed.2d 1350 (June 12, 1967).

Baton Rouge Case. The oral opinion of the District Court (R. BR. 242-250) and the order of the Court (R. BR. 158-159, 161-167) are unreported. Prior reported opinions in this case appear as follows: *East Baton Rouge Parish School Board* v. *Davis,* 289 F.2d 380 (5th Cir. 1961), cert. denied, 368 U.S. 831 (1961). *Davis* v. *East Baton Rouge Parish School Board,* 214 F. Supp. 624 (E.D. La. 1963); *id.* 219 F. Supp. 876 (E.D. La. 1963).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petitions for certiorari.

Question Presented

We adopt the question presented as stated in the Brief for the United States in Opposition, i.e.:

> "Whether the Court of Appeals for the Fifth Circuit correctly defined petitioners' constitutional duty to disestablish the dual systems of schools based on race and permissibly formulated a circuit-wide school desegregation decree."

Statement

This Brief in Opposition is submitted on behalf of the Negro pupils and parents who initiated school desegregation cases involving the public schools of the cities of Bessemer and Fairfield, Alabama, the schools of Jefferson County, Alabama, and of Caddo, Bossier and East Baton Rouge Parishes in Louisiana. In each of the cases, except the Baton Rouge case, the United States intervened as a plaintiff, and subsequently appealed a district court order approving desegregation proposals made by the school boards. The private plaintiffs, who also had opposed the boards' proposals at trial, were permitted to intervene as appellants in the Court of Appeals. The Baton Rouge appeal was pressed by the private plaintiffs.[2]

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[2] Other private counsel represent the Negro plaintiffs in the Jackson and Claiborne Parish and City of Monroe cases from Louisiana in No. 256; the United States has also participated in the Jackson and Claiborne cases.

Neither of the petitions for certiorari includes any reasonably detailed statement of the facts, the pleadings, or the desegregation plans approved by the district courts, and none of the petitions substantially relies on the facts of record as grounds for review. The Brief of the United States does contain a fair summary of the course of proceedings, the orders entered by the district courts, and the decree of the Court of Appeals. Accordingly, we omit any presentation duplicating that of the United States. But in view of the length of the records (totaling more than 1,800 pages in these six cases), we think it appropriate to make available to the Court a detailed recitation of the facts by reproducing as an appendix hereto the Statement submitted in our brief in the Court of Appeals on rehearing *en banc*. See appendix *infra*, pp. 1a to 46a.

ARGUMENT

In the years since *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294, the Court of Appeals for the Fifth Circuit, and the district courts of that circuit, have engaged in a continuing process of development of the law of school segregation. The opinion below is another step in that development. It reflects the Court's long experience with the multiple manifestations of resistance to the *Brown* decision, from open defiance by public officials through the range of subtle evasions, and, of course, with delays, delays and more delays. The central fact of these particular cases as they were submitted to the Court of Appeals was that the school boards had done very little to change the pattern of racial segregation created under segregation laws and practices. As the Court of Appeals summarized this:

> In 1965 the public school districts in the consolidated cases now before this Court had a school population of 155,782 school children, 59,361 of whom were Negro. Yet under the existing court-approved desegregation plans, only 110 Negro children in these districts, .019 per cent of the school population, attend former "white" schools. (Jefferson I, p. 21.)[3]

The Court's footnote to the above gave this data:

	Total Enrollment		Negroes Admitted to Formerly White Schools
	W	N	
Bessemer, Ala.	2,920	5,284	13
Fairfield, Ala.	1,779	2,159	31
Jefferson County, Ala.	45,000	18,000	24
Caddo Parish, La.	30,680	24,467	1
Bossier Parish, La.	11,100	4,400	31
Jackson Parish, La.	2,548	1,609	5
Claiborne Parish, La. ..	2,394	3,442	5

(Affidavit of St. John Barrett, Attorney, Department of Justice, attached to Motion to Consolidate and Expedite Appeals.)

The companion case involving East Baton Rouge Parish, where litigation began in 1956, was similar: only 158 Negroes were in formerly white schools of a total of 21,708 Negroes and 33,186 white pupils in the system in 1965. (See Appendix *infra*, p. 39, and petition in No. 282, p. 66.) And, as the court below pointed out in 1965, there was no faculty desegregation at all in Alabama, Louisiana and Mississippi (Jefferson I, p. 21).

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[3] Here, as in the petitions and in the Brief of the United States, we use the pagination of the slip opinions reproduced by petitioners in No. 256, and refer to the panel opinion of December 29, 1966 (372 F.2d 836), as "Jefferson I" and to the *en banc* opinion of March 29, 1967, as "Jefferson II."

The plans approved by the trial courts in these cases contained no provisions for faculty desegregation, no relief with respect to construction programs under the dual systems, nothing eliminating discrimination and segregation in school facilities, services and programs, nothing providing for upgrading inferior schools or otherwise eliminating the demonstrated inequalities in the educational opportunities afforded Negroes, and no orders for desegregating transportation systems, nor for any progress reports to the courts, nor for individual notices to pupils and parents of their rights under the transfer and choice systems proposed by the boards of education. The plans in the Alabama cases continued the routine placement of all pupils on a racial basis, allowing Negroes to apply for transfers to white schools subject to various restrictions. The Louisiana plans provided initial assignments in certain grades based on choice, but reserved to the school authorities the right to reject choices and assign pupils in accord with unspecified standards and procedures. Pupils who did not apply for transfers were continued in their racially segregated assignments. In short, the plans approved by the district courts in these cases dealt in an inadequate way only with the question of pupil assignment; none of them contained adequate provisions *"to effectuate a transition to a racially nondiscriminatory School System."* *Brown* v. *Board of Education*, 349 U.S. 294, 301 (emphasis added).

Given this situation, it is hardly surprising that the entire *en banc* court of twelve circuit judges was agreed that the district court decisions in each of these cases must be reversed.[4] The petitioners have devoted little or no

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[4] Circuit Judge Bell, who dissented below, wrote:

"We should order the school boards in these cases, *which they and the entire court agree must be reversed*, to forthwith complete the conversion from dual to unitary systems by the use of these minimum but mandatory directions." (Jefferson II, p. 63, emphasis added.)

argument to the defense of the district court plans in the petitions filed here.

Each of these school boards, like most boards in the Fifth Circuit, has proposed and argued in favor of student assignment under "freedom of choice" plans. Notwithstanding much of the argument in the petitions, which sounds as if free choice plans were rejected, the decree of the Court of Appeals approved the free choice plan for desegregation. The decree provides detailed requirements intended to safeguard free choice and to encourage abolition of the dual systems. It contains requirements for desegregation going beyond the mechanics of pupil assignments to strike at other basic characteristics of dual school systems. But essentially the decree provides for desegregation by free choice plans.

The main thrust of the petitions for certiorari—all the argument about racial balancing, claims of conflicts of circuits, and protests that the special punishment is being visited on southern school boards—is the boards' reaction to what they think the opinion portends for the future. The boards protest because the Court of Appeals has refused to give free choice plans a blanket endorsement for the future, and has said that if free choice plans do not in practice eliminate the dual systems which the States have created, other plans for desegregation may be required. This caveat, which we believe entirely consistent with the obligation of the courts under *Brown* v. *Board of Education*, 349 U.S. 294, to use "practical flexibility" in evolving remedies and appraising the "adequacy" of desegregation plans to reform dual systems, elicits vigorous protest for one principal reason: these school boards still resist desegregation and have retreated to free choice plans as "another line of defense" in their resistance to *Brown*. Cf. concurring opinion by Judges Sobeloff and Bell in *Bradley* v. *School*

Board of City of Richmond, 345 F.2d 310, 322, judgment vacated, 382 U.S. 108. Choice plans, almost unknown before the desegregation issue came to prominence,[5] have been chosen by many boards precisely because they were thought to promise the least change in the segregated status quo. Given the realities of life in segregated communities, the plans were viewed as least disruptive of segregation, promising to keep all-Negro schools virtually intact with minimum Negro transfers to white schools.

The Court of Appeals' promise that *de minimis* change will not suffice, that the evasive stratagems will not work, is what the noise is all about in these cases. But the Court of Appeals' promise for the future, presents no litigable matter today.

Surely the court below was precisely correct when it refused to bow to demands that it declare free choice valid for all times and places on the theory that abstractly it is "constitutional." Rather, as the court said:

> The governmental objective in this conversion is—educational opportunities on equal terms to all. The criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing this objective. (Jefferson II, p. 6.)

On the original arguments before a panel of the Court of Appeals, the Negro plaintiffs contended that free choice plans had produced so little reform of the segregationist regimes, and promised so little reform, that the court should reject them out of hand unless it was demonstrated that no alternative plans for desegregation were more

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[5] It must always be remembered that prior to the *Brown* cases, Negro children *as a class*, were considered as inferior beings and were relegated to segregated schools without any hint of choice, free or otherwise.

feasible in the particular communities. We still believe that in most communities in the deep South region, where segregationist sentiments prevail, where governors and legislatures still defy the *Brown* decision, and where Negro families risk their lives in choosing white schools, "freedom of choice" will prove to be a dismal failure, and will mean only continued segregation. But free choice plans with maximum safeguards (as in the decree below) had never really been tried in these communities, and a Court of Appeals plainly committed to equal educational opportunity indicated its view that the experiment with "real" free choice should be attempted. On reargument *en banc* the Negro plaintiffs acquiesced in the panel's decree and asked the court to affirm it. The experiment has now begun with spring registration during the past few months. The coming months, with periodic reports being filed under these plans, will provide evidence of the experience under the freedom of choice experiment. Review in this Court of the requirement that school boards adopt alternative plans, if free choice plans fail to produce reform, should await the entry or refusal of such an order. No order requiring any alternative to free choice is presented by these fundamentally moderate decrees. Each of the boards continues to function under a free choice plan.

The boards also contend that the provisions of the decree requiring desegregation of faculty and staff are improper. As the brief for the United States has shown, all of the Courts of Appeals considering this issue since *Bradley* v. *School Board,* 382 U.S. 103, have required faculty desegregation. (Brief for the United States in Opposition, pp. 9-10.) The courts have rejected arguments that the validity of faculty assignments in a racially segregated pattern was a matter to be determined differently in each case on the evidence of the effect of faculty seg-

regation on equality of educational opportunities. *Wheeler* v. *Durham City Board of Education*, 363 F.2d 738 (4th Cir. 1966). The invalidity of faculty segregation practices is plain. As this Court said unanimously in *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U.S. 714, 721:

> . . . [U]nder our more recent decisions any state or federal law requiring applicants for any job to be turned away because of their color would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment."

The boards' faculty segregation practices, thus, have no colorable claim to validity, and the order forbidding them presents no substantial question for review.

The petitions also attack the effort of the court below to prescribe uniform standards circuit-wide for school districts which adopt plans based on freedom of choice. The Court of Appeals' opinion adequately justifies this measure and the details of the plan, by reference to the inherent difficulties involved in administering free choice plans, and by reference to its long experience in reviewing desegregation cases. That experience includes experience with plans approved by the district courts which were uniform, but uniformly inadequate. (See, for example, the five substantially similar plans approved in the Western District of Louisiana; petition in No. 256, pp. 44-76.) Nor was the court unaware of the difficulty presented by the attitudes of some district judges who candidly announced their opposition to the *Brown* decision. See, for example, the opinions of Judge West in *Davis* v. *East Baton Rouge Parish School Board*, 214 F. Supp. 624 (E.D. La. 1963), and the recent opinion denouncing the *Jefferson* decree as

"ridiculous" on May 8, 1967, which is appended to the petition filed here in No. 282, pp. 51-63. Cf. the remarks of Judge Dawkins who announced in the *Caddo Parish* case that he ordered desegregation "not willfully or willingly, but because we are compelled by decisions of the Supreme Court . . . [and] . . . the Fifth Circuit . . ." (R. C. 131). But, of course, notwithstanding the specificity of the decree, it plainly left the district courts the power to order modifications upon proper showings (Jefferson I, pp. 111-112), with the court indicating that the decree contemplated "continuing judicial evaluation of compliance by measuring the performance—not merely the promised performance—of school boards in carrying out their constitutional obligation 'to disestablish dual, racially segregated school systems and to achieve substantial integration within such systems.'" (Jefferson I, p. 115).

The petitions attack the opinion below for "punitive sectionalism," asserting that southern boards are being prohibited from engaging in practices which northern boards are allowed to continue. The opinion below expressly disclaimed any attempt to decide issues involving de facto segregation in other parts of the country:

> We leave the problems of de facto segregation in a unitary system to solution in appropriate cases by the appropriate courts. (Jefferson II, p. 5, n. 1.)

In face of this disclaimer the charge of "sectionalizing" the Constitution is an invention if it suggests anything like a legal double standard; it is a truism if it merely describes the refusal of the court to decide issues presented in other parts of the country and not present on these records.

There is something grandly audacious in the boards' arguments about "racial balancing" and claims of parity

with "de facto" segregated patterns in communities that never had segregation laws. Such arguments, it must be noted, are tendered for systems such as Caddo Parish, where the record showed one Negro pupil out of a total of 24,467 in a school with white children; for three Alabama districts where all initial assignments were made on the basis of racial segregation; and for Bossier Parish, where an expert comparison of Negro and white buildings showed fifteen of the seventeen white schools rated above the top Negro building (see appendix *infra*). The court below understood the prevailing attitudes of the school systems to which the decree was directed. See, for example, the response of the Bossier Parish School Superintendent to a written interrogatory inquiring about obstacles to desegregation in the most "federally impacted" community of its size in the South (R. Bo. Vol. I, p. 56):

> Bossier Parish, Louisiana can properly be termed a "hard core" segregation area. The people in Bossier Parish have strong and fixed opinions in opposition to integration. People here feel that negroes in Bossier Parish are treated fairly and with justice and there has been an unusual degree of racial harmony. Indeed, from the negroes in Bossier Parish there has been no desire expressed for integration of the races other than that which come from Barksdale Air Force Base; that is, from non-Bossier Parish negroes.
>
> In contrast to some other areas of the South which have maintained segregated school systems, Bossier Parish is not ready for integration.
>
> /s/ EMMETT COPE
> Emmett Cope, Individually and on behalf of the Bossier Parish School Board

This in March 1965! It is fortunate that the Fifth Circuit understands the problem as well as the opinion below attests.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that these petitions for writs of certiorari should be denied.

Respectfully submitted,

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